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No. A-493

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

HAROLD CHANCEY,

PETITIONER,

VERSUS

STATE OF GEORGIA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

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30 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether a conviction under the Georgia RICO statute, which requires proof of a post July 1, 1980, predicate act, may be sustained where the only proof of the post July 1, 1980, predicate act is supplied by the uncorroborated testimony of an unindicted co-conspirator?

II. May the simple possession of a controlled substance for personal use, even if proven, be sustained as a proper predicate for a post July 1, 1980, RICO prosecution according to the intent of the Georgia RICO statute?

TABLE OF CONTENTS

	Page
Table of Authorities	iii
Opinion Below	1
Jurisdiction	2
Statutory Provisions Involved . .	2
Statement of the Case	3
Statement of Facts	4
Reasons for Granting Certiorari .	7
Conclusion	27
Certificate of Service	31

TABLE OF AUTHORITIES

Cases:	Page
Chancey v. State, 256 Ga. 415, ___ S.E.2d ___ (1986)	8
Cupp v. State, 111 Ga. App. 722, 143 S.E.2d 197 (1965)	10
In re Winship, 397 U.S. 358 (1970)	10
Parker v. State, 155 Ga. App. 617, 271 S.E.2d 871 (1980)	20
Plains Resources, Inc. v. Gable, 782 F.2d 883 (10th Cir. 1986)	25
Quaid v. State, 132 Ga. App. 478, 482, 208 S.E.2d 336 (1974). .	19
Stinson v. State, 151 Ga. App. 533, 260 S.E.2d 407 (1979)	20
United States v. Angelilli, 660 F.2d 23 (2nd Cir. 1981) . . .	25
United States v. Turkette, 452 U.S. 576 (1981)	25
Waller v. State, 251 Ga. 125, 303 S.E.2d 437 (1983)	23

PETITION FOR A WRIT OF CERTIORARI TO SUPREME COURT OF GEORGIA

The Petitioner, Harold Chancey, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of Georgia enforced on November 13, 1986.

OPINION BELOW

On November 13, 1986, the Supreme Court of Georgia affirmed Petitioner's conviction for violating the Georgia Racketeer Influenced and Corrupt Organizations Act (RICO), 1980 Georgia Laws, pp. 405, 406, Official Code of Georgia Annotated Section 16-14-1, et seq. Copies of the Court's opinion were previously forwarded.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. §§ 1961, et seq.

O.C.G.A. § 16-11-64

O.C.G.A. § 16-13-26

O.C.G.A. § 16-13-30(a)

O.C.G.A. § 16-14-1, et seq.

O.C.G.A. §§ 16-14-2(a) and (b)

O.C.G.A. §§ 16-14-3(1) and (2)

O.C.G.A. §§ 16-14-3(a) and (b)

O.C.G.A. §§ 16-14-4(a), (b) and (c)

O.C.G.A. § 16-14-10(b)

O.C.G.A. § 24-4-8;

U.S. Const. amend. V and XIV

STATEMENT OF THE CASE

On August 24, 1982, Petitioner, HAROLD CHANCEY, and seven others, were indicted by a Walton County, Georgia grand jury charging violation of the Georgia Racketeer Influenced and Corrupt Organizations Act (RICO), and among the predicate acts alleged were murder, arson, theft, tampering with evidence, possession with intent to distribute cocaine, marijuana, and quaaludes and trafficking in cocaine, illegal drugs, and marijuana.

Of the 35 separate predicate acts, alleged in the indictment, the trial court struck 23 at the conclusion of the prosecution's case. Of the remaining 12

alleged predicate acts, four contained post July 1, 1980, allegations relating to Petitioner.

On April 11, 1983, the jury reported that it was unable to reach an agreement on the murder counts, in the indictment, and a mistrial was declared. At the same time the jury found Petitioner guilty of violating the Georgia RICO statute.

On June 20, 1983 Petitoner was sentenced to 20 years confinement and was fined $25,000.

STATEMENT OF THE FACTS

On August 24, 1982 Harold Chancey, the Petitioner, was indicted by a Walton County, Georgia grand jury for violating the Georgia Racketeer Influenced and Corrupt Organizations Act (RICO), 1980 Georgia Laws pp. 405, 406, Official Code

of Georgia Annotated Section 16-14-1, et seq. The indictment included eight co-defendants and 17 unindicted co-conspirators, and consisted of four counts alleging 35 separate acts of racketeering activity. In furtherance of the alleged illegal "enterprise" the indictment charged Petitioner with the commission of four murders, arson, theft, tampering with evidence, attempting to deter a witness from testifying, and violation of the Georgia Controlled Substances Act, by manufacturing, delivering, distributing, dispensing, administering, selling and possessing quaaludes, amphetamines, marijuana, and cocaine, and trafficking in cocaine, illegal drugs, and marijuana. Additionally, appellant was also charged with conspiracy to commit the aforementioned acts. The indictment further alleged that this activity occurred

between October 15, 1976 and March 30, 1982.

At the conclusion of the prosecution's case the Court granted motions for directed verdicts in favor of two of the co-defendants and struck, from the indictment, 23 of the 35 separate paragraphs alleging racketeering activity. Only four paragraphs remained that alleged any activity, unlawful or otherwise, occurring subsequent to July 1, 1980, the effective date of the Georgia RICO statute.

The only testimony, elicted at trial, that established the commission, by Chancey, of post July 1, 1980, predicate acts, that remained described in the indictment, was supplied by unindicted co-conspirator Barbara Bell. Information from Bell, a former mistress of Chancey, initiated the investigation that resulted in the RICO indictment. Her testimony was

that Chancey asked her to lie during a grand jury appearance in 1976 and that she maintained, from 1977 until June, 1982, a set of keys to a vehicle allegedly involved in a theft. Additionally, Bell testified that Chancey used cocaine from 1980 until he left her in March, 1982.

The murder charges resulted in a mistrial, however, Chancey was found guilty of violating the Georgia RICO statute and was sentenced to 20 years confinement and fined $25,000.

REASONS FOR GRANTING CERTIORARI

The Court below, the Georgia Supreme Court, decided a substantial federal question incorrectly. The Georgia Supreme Court's decision violated applicable decisions of this Court. Specifically, the Georgia Supreme Court upheld Petitioner's conviction without substantial evidence. The Court found that it was established,

when in truth there was a failure of proof beyond a reasonable doubt establishing, that Petitioner had committed at least one predicate act after July 1, 1980, as required by Georgia's RICO statute. Chancey v. State, 256 Ga. 415, ___ S.E.2d __ (1986); O.C.G.A. §§ 16-14-3(A) and (B).

Petitioner prosecuted an appeal to the Georgia Supreme Court contending that the evidence was insufficient to support his conviction. Chancey, 256 Ga. 415. Petitioner's argument, among others, centered on the fact that the only post-1980 predicate act as to which the jury could have found him guilty involved alleged repeated attempts of simple possession and use of cocaine from January 1, 1980, through March of 1982, in the presence of Barbara Bell, a former paramour of Petitioner. The Georgia

Supreme Court rejected Petitioner's argument:

> The evidence amply authorized the jury in finding that the cocaine chronically used by Chancey until at least March of 1982 was taken from shipments of cocaine imported by him and others into the State. Thus, the state's evidence did establish a connection between the cocaine offense and the enterprise.

Chancey, 256 Ga. at 421.

I. WHETHER A CONVICTION UNDER THE GEORGIA RICO STATUTE, WHICH REQUIRES PROOF OF A POST JULY 1, 1980, PREDICATE ACT, MAY BE SUSTAINED WHERE THE ONLY PROOF OF THE POST JULY 1, 1980, PREDICATE ACT IS SUPPLIED BY THE UNCORROBORATED TESTIMONY OF AN UNINDICTED CO-CONSPIRATOR?

The Georgia Supreme Court's Chancey opinion violates the United States Constitution (and the Georgia Constitution, incidentally). The Fifth Amendment's Due Process clause as applied to the states through the 14th Amendment Due Process clause requires that a state prove beyond a reasonable doubt that an accused committed

each essential element of a crime. U.S. Const. amends. V and XIV; In re Winship, 397 U.S. 358 (1970); Cupp v. State, 111 Ga. App. 722, 143 S.E.2d 197 (1965).

As a seminal matter, this Court held in In re Winship, 397 U.S. at 361, that a state has the burden of proving beyond a reasonable doubt a defendant committed each essential element of a crime. This Court stated:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

In re Winship, 397 U.S. at 364.

This Court clearly stated the importance of its Winship holding:

> The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of

convictions resting on factual error. In re Winship, 397 U.S. at 363.

The Court then made a final comment illustrating the momentous nature of the beyond a reasonable doubt criminal standard of proof:

> Moreover, use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government can not adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty.

In re Winship, 397 U.S. at 364.

The State of Georgia charged Petitioner with violating sections 16-14-4(a), (b) and (c) of the Georgia RICO statute. O.C.G.A. § 16-14-4. The charging authority must develop its proof to comport

with its charge. Here, the State of Georgia has failed.

The Georgia RICO statute is patterned after the Federal RICO statute. O.C.G.A. § 16-14-1, et seq.; 18 U.S.C. §§ 1961, et seq. However, these statutes differ somewhat. The Georgia Supreme Court's opinion in this case discusses those differences.

RICO, in Georgia proscribes the following conduct:

> 16-14-4. Prohibited activities.
> (a) It is unlawful for any person, through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money.
>
> (b) It is unlawful for any person employed by or associated with any enterprise to conduct or participate in, directly or indirectly, such enterprise through a pattern of racketeering activity.
>
> (c) It is unlawful for any person to conspire or endeavor to violate any of

the provisions of subsection (a) or (b) of this code section.

O.C.G.A. § 16-14-4(a), (b) and (c).

In the definition section, the statute provides:

16-14-3. Definitions.

(1) Enterprise means any person, sole proprietership, partnership, corporation, business trust, union chartered under the laws of the State or other legal entities; or any unchartered union, association, or group of individuals associated in fact although not a legal entity; and it includes illicit as well as licit enterprises and governmental as well as other entities.

(2) Pattern of Racketeering means engaging in at least two incidents of racketeering activity that had the same or similar intents, results, accomplices, victims, or methods of commission or otherwise are related by distinguishing characteristics and are not isolated incidents provided at least one of such incidents occurred after July 1, 1980, and that the last of such incidents occurred within four years, excluding any periods of imprisonment, after the commission of a prior incident of racketeering activity.

O.C.G.A. §§ 16-14-3(1) and (2)

Thusly, the Georgia RICO statute like others has a requirement beyond enterprise; there must be a "pattern of racketeering activity."

There must also be a connection between the predicate act and the enterprise, the predicate act and the defendant, and the predicate act may not be merely an isolated incident. O.C.G.A. § 16-14-3(2).

Under the Georgia RICO statute the State must prove beyond a reasonable doubt that defendant committed at least one of the two required predicate acts after July 1, 1980. O.C.G.A. § 16-14-3(2). This it failed to do for the reasons shared below.

The State alleged in its indictment that Petitioner, and co-defendants, had committed 35 RICO predicate acts. 12 of these predicate acts survived motions to

dismiss. (Tr. Vol. X, pp. 20-22). Of these 12, only three alleged predicate acts concerned post July 1, 1980 offenses by Petitioner. (Indictment, Count 1, Part II, Par. 3, 19 and 31). The post July 1, 1980, predicate act allegations claim Petitioner had: (1) tampered with evidence by concealing keys to a tanker truck from January, 1977 until June 1, 1982, to prevent the apprehension and prosecution of a co-defendant for the theft of gasoline, and that he solicited Barbara Bell to conceal the keys; (2) conspired with co-defendants and others to possess with intent to distribute cocaine, marijuana, and other controlled substances; and (3) possessed cocaine.

The only evidence that Petitioner tampered with evidence came from the testimony of Barbara Bell, an unindicted co-conspirator and a former paramour of

Petitioner. Bell testified that Petitioner kicked over a can, near the site where the truck was recovered by authorities, and exclaimed, "They really were smart, weren't they? They were right under their nose." At the same time Petitioner threw her a set of vehicle keys, which she put into a cigar box until she surrendered them to the prosecutor on June 1, 1982. Bell assumed petitioner was referring to the tank truck, and there was no testimony that Petitioner asked Bell to conceal, or even keep, the keys. (Tr. Vol. III, pp. 214-216). All efforts to corroborate Bell's testimony were unsuccessful, because the keys neither fit the tank truck, located subsequent to June 1, 1982, nor other locks. (Tr. Vol. III, pp. 302-303).

As for the conspiracy to possess and distribute cocaine, marijuana, and other controlled substances, the only testimony

to establish this allegation came from the uncorroborated testimony of unindicted co-conspirators. This testimony concerned mere association subsequent to July 1, 1980. Also, an analysis of telephone records disclosed only telephone calls to or between telephone numbers possessed by the co-defendants. (Tr. Vol. IX, pp. 83, 84, 94, 95). There was no testimony as to the parties to the calls or the conversations that occurred.

Petitioner's possession of cocaine, subsequent to July 1, 1980, was established, again by unindicted co-conspirator Bell, who testified Petitioner used cocaine the last year-and-a-half they were together (1980 through March 30, 1982). (Tr. Vol. IV, p. 345). Bell admitted she never used cocaine, did not know what cocaine looked, tasted, or smelled like, but claimed the substance had

been previously identified to her, by the Petitioner, as cocaine and "coke." (Tr. Vol. IV, pp. 443, 573, 639). The only apparent effort to corroborate this "possession" testimony was through Jody Cagle, another unindicted co-conspirator. Cagle testified that petitioner visited defendant Charles Cagle twice, in July and August, 1980. Jody also testified that during this same period of time she discovered evidence that Charles had used cocaine on two occasions. (Tr. Vol. VII, pp. 135-137). There was no testimony that petitioner was present and participated on those occasions, nor is there testimony, from Jody, that petitioner possessed and used cocaine, or any other controlled substance, subsequent to July 1, 1980.

The linchpin of the proof's inadequacy is the absence of circumstances

corroborating the unindicted co-conspirator's testimony concerning Petitioner's alleged post July 1, 1980, predicate acts. It is a well settled question in Georgia that co-conspirator's testimony implicating another co-conspirator in criminal activity requires independent corroboration. Quaid v. State, 132 Ga. App. 477, 208 S.E.2d 336 (1974). Georgia's co-conspirator corroboration rule is multi-faceted. The corroboration must provide slight evidence connecting a defendant with the charged predicate act. Id. at 336. The standard is such that the corroboration need not support each material allegation. Id.

Neither corroboration equivalent to an independent witness' testimony nor capable of supporting another witness is required. Id. It is a jury question, however, the

jury cannot speculate nor be permitted to find evidence where none exists.

The Georgia Supreme Court mistakenly found corroboration for it identified no testimony or documentary evidence satisfying even the slight evidence standard. That this deficiency exists is a fact self-evident from a review of the evidence above.

Just as egregious a Federal Constitutional error is the Georgia Supreme Court's inexplicable departure from the Federal Due Process Clause's most salient burden-of-proof principle. Mere suspicion of guilt from association with others, may not singularly establish Petitioner's commission of a Georgia RICO statute predicate act. Parker v. State, 155 Ga. App. 617, 271 S.E.2d 871 (1980); Stinson v. State, 151 Ga. App. 533, 260 S.E.2d 407 (1979).

II. MAY THE SIMPLE POSSESSION OF A CONTROLLED SUBSTANCE FOR PERSONAL USE, EVEN IF PROVEN, BE SUSTAINED AS A PROPER PREDICATE FOR A POST JULY 1, 1980, RICO PROSECUTION ACCORDING TO THE INTENT OF THE GEORGIA RICO STATUTE?

Assuming arguendo that the Georgia Supreme Court rightly found corroboration, still the only post July 1, 1980, predicate act proven beyond a reasonable doubt, as a matter of law, was possession of cocaine by Chancey.

The State attempted to use simple cocaine possession to prove Petitioner had committed at least one predicate act after July 1, 1980. O.C.G.A. § 16-14-3(2) (Indictment, Count 1, Part II, Par. 31). It is true that the statute portends that a "racketeering activity" includes committing, attempting to commit, or soliciting another person to violate the Georgia Control Substances Act, which

prohibits possessing any controlled substance such as cocaine. O.C.G.A. § 16-14-3(i); 16-13-26; 16-13-30(a)(1984). At first blush simple cocaine possession appears to be properly included as a Georgia RICO predicate offense. Id. The analysis, however, must include an examination of the intent of the Georgia legislature.

Such an examination is made easy by the legislation itself in that Georgia included legislative intent for RICO within the statute. O.C.G.A. § 16-14-2(a) and (b):

> Findings and Intent of General Assembly.
>
> (a) The General Assembly finds that a severe problem is posed in the State by the increasing organization of certain criminal elements and the increasing extent to which criminal activities and funds acquired as a result of criminal activity are being directed to and against the legitimate economy of the State.
>
> (b) The General Assembly declares that the intent of this chapter is to

> impose sanctions against this subversion of the economy by organized criminal elements and to provide compensation to private persons injured thereby. It is not the intent of the General Assembly that isolated incidents of misdemeanor conduct be prosecuted under this chapter, but only an interrelated pattern of criminal activity, the motive or effect of which is to derive pecuniary gain. This chapter shall be construed to further that intent. (Emphasis added.)

Read at its clearest level, the section cannot include simple cocaine possession as a Georgia RICO predicate offense. In parallel reasoning, the Georgia Supreme Court construed the language in Waller v. State, 251 Ga. 125, 303 S.E.2d 437 (1983). Waller had argued that certain evidence which the State discovered through electronic surveillance pursuant to O.C.G.A. § 16-11-64 should not have been admitted into evidence because it had been disclosed to the Federal Bureau of Investigation, the Georgia Bureau of

Investigation, the Organized Crime Prevention Counsel and the Internal Revenue Service. Id. at 441. In the context of this argument, the Georgia Supreme Court said:

> In view of the fact that this prosecution is for violations of the statute aimed at organized crime, it is reasonable to find that organized efforts of organized law enforcement agencies are essential and necessary. This finding is supported by the clear language of O.C.G.A. § 16-14-2(b). (Code Ann. § 26-3401), which sets forth the intent of the General Assembly in enacting the RICO statute, to impose sanctions against an interrelated pattern of criminal activity, the motive or effect of which is to derive pecuniary gain. Our interpretation of the General Assembly's intent to foster cooperation between law enforcement agencies as necessary to the prosecution of organized crime is further borne out by a recent amendment to the RICO statute authorizing reciprocal agreements with the chief prosecutors of any jurisdictions having substantially similar statutes. O.C.G.A. § 16-14-10(b) (Code Ann. § 26-3409, Ga. Laws 1982, p. 1385, Sec. 12.) (Emphasis added.)

Id. at 442.

As mentioned above, the blueprint of Georgia's RICO statute is akin to that of the Federal RICO statute. Chancey v. State, 256 Ga. at 416. Federal precedent does not control interpretation of State law. Plains Resources, Inc. v. Gable, 782 F.2d 883, 888 (10th Cir. 1986). It merely acts as a persuasive guide. The Georgia Supreme Court's Chancey decision attempts to divine the Federal RICO statute's intent:

> The overriding purpose of the Federal RICO statute is to deal with the problem of the infiltration of organized crime into all areas of American life through the money derived from its illegal endeavors. The provisions of RICO are intended to repair defects in the evidence gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal or other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime. United States v. Turkette, 452 U.S. 576, 589, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981); United

States v. Angelilli, 660 F.2d 23, 32 (2nd Cir. 1981).

Chancey, 256 Ga. at 416.

Neither of the RICO statutes' legislative histories specifically compels a conclusion that simple cocaine possession is a proper predicate offense. The analysis here clearly indicates simple cocaine possession is not a proper RICO predicate. All of the Georgia State RICO economic targets are in no way touched by simple cocaine possession. This is true even in the presence of the convoluted reasoning of the Supreme Court of Georgia in attempting to find that if indeed Chancey used cocaine, it must have been from his own importation of it. The State neither proved, given their burden, and considering the post July 1, 1980, proof, that Harold Chancey used nor imported cocaine. Simple cocaine possession or

abuse, even when proved, has no element which contains "the motive or effect of which is to derive pecuniary gain." O.C.G.A. § 16-14-2(b). Therefore, simple cocaine possession must fail as a predicate, whether before, during, or after July 1, 1980.

CONCLUSION

RICO prosecutions and their progeny are proliferating throughout the nation in both state and federal courts. The Georgia Supreme Court has, in the instant case, failed to police its own house by a simple shotgun approach to Chancey and his charges. The mandates of due process as applied to the State of Georgia are not easily misunderstood. A criminal defendant is entitled to notice; the State has the duty to meet a Constitutional burden

consonant with the beyond a reasonable doubt standard; this duty requires that each element charged as chosen by the charging authority be addressed. It is here the State of Georgia failed and that failure was dictated by an inartfully drafted statute, inadequate evidence, and a Georgia Supreme Court wearing blinders.

RICO and its intent are not in and of themselves abhorrent to a functioning American criminal justice system. The application must be patterned, however, with caution, care, and conservatism. Here the statute itself has been applied to Harold Chancey in no less a confusing or repugnant manner than the Georgia legislature drafted it. The statute cannot, if language is to have meaning in the criminal justice system, be both an organized crime pecuniary weapon and a vehicle to enhance the punishment of simple

possession of cocaine or its personal abuse.

Moreover, the State of Georgia cannot be permitted to ignore the very underpinnings of the same system by inadequate evidence, nor be permitted to sustain critical elements violative of basic constitutional precepts by the stroke of one very broad brush. The statute, if clearly written, and properly applied, is broad enough without the relaxation of due process as to one or more elements, or to the blatant pattern of ignoring the very Georgia evidentiary rules promulgated to insure the same Constitutional guarantees. RICO prosecutions such as these are an effective tool, cautiously applied, but the very nature of them as an inclusive vehicle makes even more valuable the fundamentals of the Constitution and its guarantees. For these inherent reasons, this Court

should grant the petition herein to settle the question of Constitutional scope and adherence to the principles of legislative construction, burden of proof, and clarity in prosecutions such as this.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true and correct copy of the foregoing Writ of Certiorari upon the following:

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by depositing same in the United States Mails with adequate postage affixed thereto.

This 11th day of February, 1987.

ROBERT G. FIERER